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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 37

CIVIL.

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF AMICUS CURIAE STATE OF MISSOURI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 593.

CIVIL.

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF AMICUS CURIAE STATE OF MISSOURI.

INTEREST OF AMICUS CURIAE STATE OF MISSOURI.

The interest of the State of Missouri is in maintaining inviolate the exclusive authority and jurisdiction of the courts of Missouri to adjudicate title to Missouri land.

Essentially, the question here involved is whether a judgment rendered by a Nebraska court can nullify, take away or limit the exclusive power of the courts of Missouri to adjudicate title to Missouri land. The District Court held that by litigating in Nebraska jurisdiction of the Nebraska courts to determine title to the land, the parties thereby deprived Missouri courts of any jurisdiction to determine the ownership of such land as between the parties even though, in fact, the land was in Missouri and beyond the authority of Nebraska to affect.

The Supreme Court of the State of Nebraska has determined unilaterally where the boundary lies between the two states; has decreed title to land in petitioners, who claim solely by virtue of a tax sale for nonpayment of Nebraska real property taxes upon land located on the Missouri side of the Missouri River; and has further decreed "that [respondent's] swamp land patent from the State of Missouri conveyed no title to her". *Durfee* v. *Keiffer*, 95 N.W.2d 618, l.c. 624.

The position of Missouri fundamentally is that Missouri land is exclusively subject to laws of Missouri and to the jurisdiction of its courts in the county wherein the land is situated, and that no judgment of any court of another state, no action or estoppel of private litigants can have the effect of compelling this state to surrender its sovereign rights in respect to lands therein and the exclusive authority of its courts to determine the title and ownership thereof and the validity of its swamp land patents.

The essential question involved in the action instituted in the Missouri circuit court (removed to the Federal District Court on diversity of citizenship grounds) was which of the parties has the better Missouri title to

Missouri land. Such a question by its very nature can be adjudicated only in the proper Missouri court. The only question which the Nebraska court could adjudicate in the action culminating in the judgment of its Supreme Court was which of the parties had the superior Nebraska title to land claimed to be in Nebraska.

It may well be true that as a prerequisite to the exercise of its jurisdiction to determine Nebraska title, the Nebraska court was required to determine the location of the land. However, this determination is of consequence only insofar as it vested jurisdiction in the Nebraska court to ascertain the superior Nebraska title. On the other hand, if Missouri has exclusive jurisdiction to determine Missouri title, it must be equally true that the Missouri courts likewise have full authority to determine the location of the land for the purpose of exercising such exclusive jurisdiction. *Res judicata* is a defense on the merits at best, and should not be held to operate to deprive the courts of another state of its sole jurisdiction over lands therein.

The authorities cited in the briefs of the parties to this case, and in the decision of the Court of Appeals, clearly demonstrate that the doctrine of *res judicata* is founded upon public policy. The Court of Appeals rightly held that where there is a superior public policy, *res judicata* is subservient thereto and may not be applied. There is a superior public policy in the instant case, namely a policy to maintain unimpaired the exclusive jurisdiction of the courts of Missouri to determine title to land therein.

It has been stated that Missouri as a state would not be bound by the results of the litigation in the Nebraska courts to which it was not a party. While that may be literally true, insofar as the ultimate determination of

the state's boundaries are concerned, the recognition of the Nebraska judgment as urged by appellants, and by the District Court in holding it was deprived of jurisdiction thereby, necessarily results in binding Missouri and its courts. The District Court held that it was deprived of jurisdiction to determine Missouri title solely because of the Nebraska litigation. If that ruling should be sustained, it means that the litigation between private parties does in fact bind Missouri.

Moreover, even if, in subsequent litigation between the states themselves, this Court should, by its determination of the boundaries between the states, determine that the land is in truth in Missouri, Missouri would then be compelled to recognize not the superior Missouri title but the Nebraska title founded upon a tax deed resulting from nonpayment of Nebraska taxes on Missouri land! To say that only the parties are bound, in this situation, ignores reality and begs the question. Respondent derived her Missouri title from the grant of the Missouri swamp land patent. No party other than the parties to this litigation or their privies can now claim title to the land. Hence, if compelled to recognize the Nebraska judgment as a valid determination of title to Missouri land, Missouri itself would necessarily be bound thereby and as a result compelled to concede that the courts of Nebraska have the unilateral power to deprive the courts of Missouri of their exclusive authority to determine title to Missouri land.

In this brief, we will discuss the public policy of the State of Missouri with respect to title of lands, and show that such policy is of such an overriding nature as to prevent the application of the doctrine of *res judicata* to the instant situation, and also show that full faith and credit, in the sense in which petitioners seek to apply it, should not be given to the Nebraska judgment. It may well be

that a decision in both states would result in conflicting determinations respecting the ownership of the land. However, once it is understood that Nebraska's judgment determined only the superior Nebraska title and that a Missouri judgment could determine only the superior Missouri title, there could, in truth, be no conflict in the absolute sense. Once this Court determines the boundary, it will then at once be seen which of the two judgments is of value to the prevailing party.

ARGUMENT.

Full Faith and Credit.

The District Court did not base its decision on full faith and credit. The Court of Appeals correctly ruled that the full faith and credit clause does not require Missouri to accept the judgment of the Nebraska court as a conclusive adjudication of title to Missouri land. Every judgment depends upon the power of the Court to render it. The District Court found, as is the fact, that the land in question is Missouri land. Nebraska courts are therefore wholly devoid of any power whatsoever to adjudicate the title thereto. It matters not that the parties may have litigated the question in Nebraska. The want of authority to enter the judgment is not thereby affected.

Land is unlike status, in that it necessarily is local and fixed. It is a special kind of subject-matter, jurisdiction over which can never be conferred by the parties contrary to the policy of the State wherein it is located. Hence, the determination of one state that it has jurisdiction over land which, in fact, is located in a sister state cannot operate to validate its judgment or deprive the sister state of its exclusive authority to determine title to such land.

Missouri alone has the power to adjudge title to land within its boundaries. As a necessary corollary to the proposition, it follows that any judgment of another state adjudging title to such land is void for want of jurisdiction, and Missouri is not compelled to recognize the Nebraska judgment to the extent it is sought thereby to adjudge such title. *Fall* v. *Eastin*, 215 U.S. 1; *Carpenter* v. *Strange*, 141 U.S. 87, 106.

The suggestion has been made that the Nebraska judgment would be conclusive and not subject to collateral attack in Nebraska courts. If true, this is beside the point. The Nebraska judgment purported to declare the state of the Nebraska title. Whatever that title may be worth, it may be conceded that petitioners have the superior Nebraska title, and that the judgment of the Nebraska court to such effect is conclusive. But since the instant case is not concerned with the Nebraska title at all, that judgment would not—and could not—be conclusive, in Nebraska or elsewhere, as to which party has the superior Missouri title to Missouri land. Hence, if the Nebraska court by its judgment purported to declare the Missouri title, it would be wholly without jurisdiction so to do; and if its judgment be construed to declare Missouri title, it need not be accorded full faith and credit in the courts of the state wherein the land is in fact located.

Missouri further submits that the Supreme Court of the State of Nebraska, upon the face of its judgment (*Durfee* v. *Keiffer*, 95 N.W.2d 618, 624), itself rejected the requirement of full faith and credit when it failed to give force and effect to the public act of the County Court of Holt County, Missouri, in granting to respondent her swamp land patent. A party claiming by virtue of that judgment should not, therefore, be permitted to apply a double standard.

The decisions of this Court in the twin cases of *Arkansas* v. *Tennessee*, 246 U.S. 158, 62 L. ed. 638, and *Cissna* v. *Tennessee*, 246 U.S. 289, 62 L. ed. 720, are controlling and afford an additional reason why full faith and credit should not be accorded the Nebraska judgment. Where any decision of a state court is sought to be applied for the purpose of establishing the location of a water course boundary between two states it has no force and effect. That power resides in this Court alone (*Missouri* v. *Nebraska*, 196 U.S. 23, 49 L. ed. 372).

Hence, because the decision of the Supreme Court of Nebraska at issue does, in effect, purport to adjudicate the location of the boundary between the states and because jurisdiction of that question remains in this Court by way of an original action between the states, the judgment of Nebraska's Supreme Court cannot be of a type entitled to full faith and credit and Missouri should not be required to give force and effect to it in its courts.

This Court, in *Arkansas* v. *Tennessee* and *Cissna* v. *Tennessee*, *supra*, has already repudiated the notion that Nebraska may, as is suggested in its *amicus* brief herein (p. 4), "lift itself by its own bootstraps." If this were so, utter chaos would result. Surely, the full faith and credit portion of the Constitution of the United States cannot be applied to accomplish the same end.

Res Judicata.

The United States District Court for the Western District of Missouri, upon removal of the instant proceeding to it, sat as a court of the state of Missouri to try title to Missouri land. This is true with reference to the questions at issue here as established in the majority, as well as the minority, opinions in *Angel* v. *Bullington*,

(1947) 330 U.S. 183, 91 L. ed. 832. See also *Erie Railroad* v. *Tompkins*, (1938) 304 U.S. 64, 82 L. ed. 1188, 1195; *Ruhlin* v. *New York Life Insurance Company*, (1938) 304 U.S. 202, 82 L. ed. 1290, 1293. Therefore, when the United States District Court for the Western District of Missouri undertook to apply the doctrine of *res judicata* to this case, it was bound to apply it as the Missouri courts would have applied it when it found, as a matter of fact, that the land in question was in Holt County, Missouri, and not in Richardson County, Nebraska. In truth, the District Court gave no consideration at all to the basic policy of Missouri.

With reference to title to Missouri land, we need not resort to generalizations upon the subject of *res judicata* because Missouri's public policy in this respect is declared by statute and many court decisions.

The question dissolves immediately by reference to one of the more recent decisions of the Supreme Court of Missouri upon the subject. *March* v. *Gerstenschlager*, (Mo. 1959) 322 S.W.2d 743, 744.

"* * * This suit was filed in the Circuit Court of the City of St. Louis and all proceedings were had there. The real estate is in St. Francois County.

"We are confronted immediately with a question of jurisdiction, although the parties have not raised it. Section 508.030 [RSMo. 1959] is as follows: 'Suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon, shall be brought in the county where such real estate, or some part thereof, is situated.' It has been held that the provisions of this section are mandatory and that its provisions cannot be waived." (Citing prior Missouri cases.)

The case went on to hold that because the proceeding there was instituted in a county other than one where the land was located the judgment affecting the title was void even though all parties thereto deliberately sought the jurisdiction of the court rendering the judgment and had not raised the question on appeal.

In *Howell* v. *Reynolds*, (Mo. 1952) 249 S.W.2d 381, 384, the Supreme Court of Missouri stated:

> "The decree expressly determined an issue affecting title to real estate. Therefore, even though the judgment of the trial court was void, nevertheless jurisdiction of the appeal lies in this court. In the case of Watts v. Watts, 304 Mo. 361, 365, 263 S.W. 421, 422, an analogous situation was under consideration, and this court there said: 'It is claimed that, because the judgment attempting to divest the title to the real estate is void, this court is without jurisdiction of the appeal. The title to real estate is directly affected by the judgment so as to give this court jurisdiction, although the judgment is void on its face. This is the court to determine the question whether the judgment, which in form transfers property from one party to another, has that effect.'"

The only possible remedy with reference to the trial of title to the land in question, in a court having jurisdiction over the land, would, of necessity, involve collateral attack upon the prior final judgments of the Nebraska courts if they be construed to adjudicate the superior Missouri title. Because the judgments of those courts are void according to the law and decisions of the Supreme Court of Missouri (if the land does in fact lie within the State of Missouri), then the courts of Missouri not only are not bound by the doctrine of *res judicata* to give effect to the judgments of the courts of Nebraska pertaining thereto, but also are prohibited from doing so.

When the Supreme Court of the State of Missouri says that a judgment affecting title to Missouri land rendered by a court not sitting in the county where the land is located is void, it means that such judgment is as if never rendered and such a judgment, being no judgment at all, may not be considered or applied under the doctrine of *res judicata*.

> "As to res judicata, which was relied on by the trial court, a void judgment may not be used as the basis for the application of that Doctrine." *Berry* v. *Chitwood*, (Mo. 1962) 362 S.W.2d 515, 517.

In *Ripley* v. *Bank of Skidmore*, (Mo. 1947) 198 S.W.2d 861, l.c. 864, the Supreme Court of Missouri collected what it deemed to be the authorities upon the subject and stated the law of the state with respect to void judgments and *res judicata*:

> "It [the judgment] was not merely erroneous or irregular, it was void ab initio. Certainly a void judgment may not be held to be evidence of probable cause. 'No conclusive effect can be given to a judgment which is absolutely void * * *.' 34 C.J., Judgments, Section 1310. Nor does a void judgment have any effect as an estoppel. 34 C.J., Judgments, Section 1183.
>
> 'All proceedings founded on a void judgment are themselves regarded as invalid.' 31 Am. Jur., Judgments, Section 430, quoted in Re Main's Estate, 236 Mo. App. 88, 152 S.W.2d 696."

The same principle has been stated in a number of other cases in Missouri. See *MacIntosh* v. *Wiggins*, (Mo. 1947) 204 S.W.2d 770, and cases cited.

Therefore, when the United States District Court for the Western District of Missouri found that the land in

question was, in fact, in Missouri, its duty was to proceed to exercise jurisdiction to determine the Missouri title and consider the merits according to Missouri law. In so doing it should have, of necessity, rejected the Nebraska judgment insofar as it may be deemed to adjudge the Missouri title. When it failed to do so it erred according to *Angel* v. *Bullington*, *Erie Railroad Co.* v. *Tompkins* and *Ruhlin* v. *N. Y. Life Ins. Co.*, *supra*. Thus, the United States Court of Appeals for the Eighth Circuit properly reversed and remanded, and its order should be affirmed.

CONCLUSION.

The Full Faith and Credit Clause of the United States Constitution does not require the State of Missouri or its courts to recognize an adjudication by the courts of a sister state declaring land which, as a matter of fact, falls within the boundary of the State of Missouri to be a part of the sister state and adjudging title thereto.

The doctrine of *res judicata* should not be employed to deprive the courts of Missouri of their exclusive power to try title to Missouri land.

Respectfully submitted,

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